



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 30, 2004

Ms. Julie Joe
Assistant County Attorney
Travis County
P.O. Box 1748
Austin, Texas 78767

OR2004-5341

Dear Ms. Joe:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 204507.

The Travis County Counseling and Education Services (the "CES") received a request for information related to the policies pertaining to the referral process of vendors and complaints made against vendors. You state that the CES does not have any information related to policies. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, *writ dismiss'd*); Open Records Decision No. 452 at 3 (1986) (governmental body not required to disclose information that did not exist at time request was received). You also state that you have released some of the requested information. You claim that the submitted information is excepted from disclosure under sections 552.101 and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses information other statutes make confidential. You claim that a portion of the submitted information is confidential pursuant to the confidentiality provisions found at part 2 of title 42 of the Code of Federal Regulations. Those rules provide, in pertinent part:

Records of the identity, diagnosis, prognosis, or treatment of any patient which are maintained in connection with the performance of any program or activity relating to alcoholism or alcohol abuse education, training, treatment, rehabilitation, or research, which is conducted, regulated, or directly or indirectly assisted by any department or agency of the United States shall, except as provided in subsection (e) of this section, be confidential and be disclosed only for the purposes and under the circumstances expressly authorized under subsection (b) of this section.

42 C.F.R. § 2.2(a). You state that one of the submitted documents was sent by a CES counselor to the Texas Commission on Alcohol and Drug Abuse and relates to the performance of a program or activity relating to alcoholism or alcohol abuse education, training, treatment, rehabilitation, or research. You also state that one of the submitted documents identifies a client who was receiving substance abuse services. Further, you do not inform us, nor do the submitted records indicate, that release is authorized under subsection (b), or that an exception found in subsection (e) applies in this instance. Thus, upon review of this information, we find that the document that identifies a client that received substance abuse services, which we have marked, is confidential pursuant to the federal regulations and must be withheld under section 552.101 of the Government Code. We find, however, that you have not demonstrated that the other document you seek to withhold constitutes a record of the identity, diagnosis, prognosis, or treatment of any patient. Therefore, you may not withhold this document under section 552.101 in conjunction with this provision of the Code of Federal Regulations.

However, you also seek to withhold this document under section 552.101 in conjunction with section 464.011 of the Health and Safety Code. Section 464.010(e) provides as follows:

All records *made by the commission* during its investigation of alleged abuse or neglect are confidential and may not be released except that the release may be made:

- (1) on court order;
- (2) on written request and consent of the person under investigation or that person's authorized attorney; or
- (3) as provided by Section 464.011.

Health & Safety Code § 464.010(e) (emphasis added). Section 464.011 states that “[u]nless prohibited or limited by federal or other state law, the commission may make its licensing and investigatory records that identify a client available to a state or federal agency or law enforcement authority on request and for official purposes.” Health & Safety Code § 464.011. We find, however, that these sections only apply to records “made by the

commission,” which is defined as “the Texas Commission on Alcohol and Drug Abuse.” Health & Safety Code § 464.001(2). *See generally* Open Records Decision Nos. 658 at 4 (1998) (statutory confidentiality must be express, and confidentiality requirement will not be implied from statutory structure), 478 at 2 (1987) (statutory confidentiality requires express language making certain information confidential or stating that information shall not be released to the public). Section 464.010(e) does not apply in this instance and therefore does not make any of the submitted information confidential.

Finally, we address your argument under section 552.111 of the Government Code. Section 552.111 excepts from disclosure “an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency.” In Open Records Decision No. 615 (1993), this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ), and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 364 (Tex. 2000); *Arlington Indep. Sch. Dist. v. Tex. Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.). An agency’s policymaking functions do not encompass internal administrative or personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. ORD 615 at 5-6.

Additionally, section 552.111 does not generally except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *Arlington Indep. Sch. Dist.*, 37 S.W.3d at 160; ORD 615 at 4-5. The preliminary draft of a policymaking document that has been released or is intended for release in final form is excepted from disclosure in its entirety under section 552.111 because such a draft necessarily represents the advice, recommendations, or opinions of the drafter as to the form and content of the final document. Open Records Decision No. 559 at 2 (1990). Further, when determining if an interagency memorandum is excepted from disclosure under section 552.111, we must consider whether the agencies between which the memorandum is passed share a privity of interest or common deliberative process with regard to the policy matter at issue. *See* Open Records Decision No. 561 at 9 (1990).

Having reviewed your arguments and the information in question, we have marked the information that consists of advice, recommendations, and opinions reflecting the policymaking processes of the CES. The CES may withhold the marked information under section 552.111 of the Government Code. The remaining information you seek to withhold under section 552.111 does not consist of advice, recommendations, or opinions reflecting the policymaking processes of the CES, and thus may not be withheld under that exception. Because you claim no other exception for this information, it must be released.

In summary, we conclude the CES (1) must withhold the information we have marked under section 552.101 in conjunction with part 2 of title 42 of the Code of Federal Regulations, and (2) may withhold the information we have marked under section 552.111 of the Government Code. The remaining submitted information must be released.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read 'Sarah I. Swanson', followed by a long horizontal line extending to the right.

Sarah I. Swanson
Assistant Attorney General
Open Records Division

SIS/sdk

Ref: ID# 204507

Enc. Submitted documents

c: Ms. Diana Escamilla
Executive Director
The Office of Adelante
9034 North IH-35
Austin, Texas 78753
(w/o enclosures)